

## Ocean Advocates

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11 August 2006

### Comments on Proposed ESA Critical Habitat for Southern Resident Killer Whales

Based on my initial read I was prepared to commend NOAA Fisheries for your thoughtful and timely proposal. Having had the opportunity to attend the public meeting in Friday Harbor on July 13<sup>th</sup> and reflect on the proposal in greater depth I am left with a less satisfying impression than I began with as will be discussed below. Given the importance of this critical habitat designation for the recovery of the Southern Resident Community and the importance of a thorough public review, I am dismayed that you have conducted your public comment period over the summer when the research community, whale watch industry and general public are either in the field or recreating.

I am pleased to see that NOAA did not resort to just proposing the waters surrounding the San Juan Islands in this designation, for that would have only covered the core area of their spring to fall movements. However, the blanket exclusion of Naval activities, the failure to include the acoustic environment as a Primary Constituent Element, and the asserted lack of federal nexus to consult on vessel traffic issues makes the current proposal analogous to a large donut with nothing in its center.

While the size of the proposal is larger than originally expected, the rationale for the exclusions are not well justified. The near shore environment plays a critical role for killer whale recover in that they use the shoreline to herd salmon and often swim within a few feet of the shore along the west side of San Juan Island, especially near Whale Watch Park. In addition, the nearshore is the nursery of the forage fish that are eaten directly and by salmonid prey and also serves as a pathway for pollution. However, if the concern was that the habitat needs to be occupied for it to be included, it would be difficult to define all those areas that are actually utilized. However, the dramatic decline of forage fish populations in such places as Cherry Point underscores the importance of NOAA including forage fish spawning grounds as unoccupied areas in the critical habitat designation.

There is no specific rationale given for the military exclusion other than blanket statements asserting the designation would impede military readiness. Certain activities may be exempted from regulation, but by no means should wholesale exemptions be given to military bases that do not have integrated management plans or operating areas that are not under the sole control of the military. For example, why should polluted Naval bases be

allowed to continue polluting killer whale habitat, if cleaning up such sites does not interfere with military readiness? The Puget Sound region is home to the third largest Naval complex in the world. They need to be able to work within the law, not to be exempted from it. In fact they should be engaged to contribute their maritime expertise to the recovery effort.

Perhaps the most egregious exclusion from the current proposal is the failure to include any ocean habitat. There are several references to the use of the Olympic coast by Southern Resident killer whales, but none of this habitat is included in the proposal. The inclusion of Juan de Fuca Strait (Area 3) as a transit area only makes sense if there is outer coast habitat to transit to and from. After several years of dedicated effort to establish winter whale habitat, NOAA, in collaboration with the Center for Whale Research, has consistently found southern resident whales off the Olympic coast in the winter. The most striking feature found off the coast is the Columbia River. The arrival of Spring Chinook salmon runs bound for the Columbia coincides with the sightings of whales off the coast. The aerial extent of the freshwater plume of the Columbia River should be included in this proposal. Such a boundary would also enable NOAA to engage the resources of the Olympic Coast National Marine Sanctuary in the recovery and monitoring efforts. NOAA should not exclude this region that provides significant amounts of salmonid prey during the time of year when whales often give birth and lactate when prey quantity is otherwise low.

It is feared that this amounts to an unaccounted for military exclusion due to the extensive operating areas found along the Olympic Coast. If NOAA's failure to use the data you have collected is due to military machinations, then they should be "credited" with such considerations. However, such an inclusion would significantly alter the purported 5% of critical habitat exempted due to military considerations. The fact that none of these exemptions occurs within Area 1 appears to be due to the selective drawing of the boundary around the Strait of Juan de Fuca Naval Air to Surface Weapon Range Restricted Area whose close proximity to Hein Bank makes such distinction spurious.

While NOAA's regulations precludes the designation of critical habitat in foreign countries, specific statements should assert the desirability of Canada's Department of Fisheries and Oceans to designate critical habitat adjacent to sites identified in US waters as appropriate in Areas 1,3 and the outer coast. The lack of description of international collaboration is unfortunate especially in light of the fact that NOAA is in regular contact with DFO and the recently created Subcommittee on Integrated Management of Ocean Resources recognizes the importance of addressing when resource management issues cross jurisdictional boundaries.

#### Features that may require Special Management Considerations:

It is inappropriate to refer to pollution levels found in harbor seal blubber as evidence of Area 1 as having low to moderate contaminant levels because of the limited geographic scope of such sampling. Had samples been taken from seals in Bellingham Bay or the mouth of Nooksack River when NW Transformer Inc. was in business or downwind of the refinery

outfalls by Lummi Island, the results would be quite different than those found from seals collected off Smith Island.

After recognizing that Area 1 is home to four of the State's five refineries and the vast majority of whale watch vessel activity, NOAA finds that there is no federal nexus to consult on vessel activities. This is particularly disturbing in light of the fact that oil spills have been found to be a major source of jeopardy to the recovery of the killer whales and this recent posting from DFO:

### **Northern Resident C21 found dead, possible vessel collision**

I'm sorry to report the loss of a female northern resident killer whale known as C21 from the C6 Matriline. C21 was born in 1994 to C8. The northern resident population of killer whales numbers approximately 220 and is listed under Canada's Species at Risk Act (SARA) as Threatened.

On Tuesday July 18th, a local fisherman reported a floating killer whale carcass in the vicinity near Prince Rupert, BC. Doug Davis of Adventure Tours in Prince Rupert responded immediately and secured the carcass, until local DFO Fishery Officers could retrieve the carcass and tow it to a DFO facility in Prince Rupert. Because this incident was reported so promptly, we were able to gather a necropsy team, led by Dr. Stephen Raverty of the BC Centre for Animal Health, and complete a full necropsy on Wednesday.

While a definitive cause of death awaits Dr. Raverty's complete assessment, there was evidence of a serious blunt force trauma, possibly resulting from collision with a vessel. DFO is very concerned about vessel strikes on killer whales and other cetaceans. There have been two other confirmed vessel strikes of killer whales in the last year that have heightened concerns on both sides of the border. In the July of 2005, a southern resident collided with a vessel near San Juan Island, and last week, on July 14, a northern resident calf was struck in Johnstone Strait. Graeme Ellis has identified A82 as the whale likely involved in the recent incident.

Fisheries & Oceans Canada would like to remind boaters to **BE WHALE WISE** and follow the guidelines established for safe boating in the vicinity of marine wildlife. In particular, we would ask that boaters be observant for whale activity, slow down and maintain at least 100 m from any whale when in their vicinity.

In addition, we would like to thank the fisherman that promptly reported the Prince Rupert carcass and ask that anyone observing a marine mammal incident (stranding, carcass, vessel strike, injured animal, etc) or a violation (harassment, shooting, or other take), in Canadian waters, to report it immediately to the **DFO Observe Record and Report (ORR) Hotline at 1-800-465-4336.**

Marilyn Joyce  
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**Oil Spills** - Had NOAA included the nearshore environment as unoccupied areas in the critical habitat designation, oil spills would have the potential to significantly impact the habitat, not just the whales themselves as inappropriately asserted by NOAA. Consequently, there are various ways in which NOAA should assert their consultative authority over vessel traffic. First as the recent case *Ocean Advocates v. US Army Corps of Engineers* and BP demonstrates, the need to consider the impacts on vessel traffic from

port infrastructure development is well established by the Ninth Circuit Court of Appeals. Furthermore, the ability of the federally funded Coast Guard vessel traffic management system to keep up with the growth of vessel traffic through this region is subject to consultation considerations. The Coast Guard also certifies US flagged vessels and crews are fit for service and as US representatives to the IMO set standards for international vessels and crews as well.

**Whale Watching** – while it is asserted that critical habitat designation will have little affect on vessel traffic activities it is suggested that it will provide conservation benefits due to its educational value for boaters. This narrow interpretation of NOAA's responsibilities is unfortunate in light of the fact that NOAA funded research has documented that whale watching activity has impacts on the speed and directness of whale swimming patterns as well as on their respiration rates. Rather than debate the significance of such impacts, what is most troubling is NOAA's failure to collect the most basic data in their responsibility to manage this open and unregulated fishery – effort. Given that the US Coast Guard certifies that every US whale watch operator and their vessel is suitable for taking paying passengers to see the whales, there is ample federal nexus for NOAA's involvement. However, I am not suggesting that the voluntary whale watch guidelines are inadequate only that they be enforced and that NOAA collects data as to how much time US certified vessels spends with the whales and how many passengers get educated. Ideally, the Whale Watch Operators Association would also provide data from Canadian based operators.

**Noise** – the unmitigated discharge of Navy mid-frequency sonar clearly is a source of concern to the recovery of the southern resident community. However, it may be difficult to assert that sonar damages critical habitat when the whales are not present. Therefore, it is imperative that the Navy be obligated to utilize their passive sonar capacity to ascertain the presence of the whales prior to the use of sonar rather than just relying on visual detection that clearly did not work during the Shoup incident. Fixed passive sonar arrays could also be used to track whale movements when sonar is not being used. However, ambient noise directly impacts critical habitat as it impacts the ability of the whales to communicate and find prey on an ongoing basis. Therefore, it is imperative that NOAA starts monitoring ambient noise levels at various locations throughout the proposed critical habitat to establish a baseline that can be used to monitor changes in ambient levels and to track whale movements.

In closing, while NOAA's proposal appears relatively large it still fails to account for much of the whales' late winter and early spring habitat found off the coast. The failure to envision any meaningful way to consult on vessel traffic, or to monitor whale watching activity or acoustic pollution, and to grant blanket exemptions to the Navy significantly limits the conservation value of the current proposal.

Sincerely,

Fred Felleman, MSc.  
NW Director

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